(3)

No. 10-1084

In the Supreme Court of the United States

COREY FERGUSON, PETITIONER

v

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the failure to disclose oral representations by the government to a cooperating witness entitled petitioner to a new trial under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Giglio* v. *United States*, 405 U.S. 150 (1972).

2. Whether the court of appeals correctly applied the harmless-error doctrine to the admission of evidence seized from petitioner's residence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is not published in the Federal Reporter, but is reprinted in 385 Fed. Appx. 518. The district court's memorandum opinion denying a new trial is unreported, but is available at 2008 WL 339635. The district court's memorandum opinion granting in part and denying in part petitioner's pretrial motion to suppress is unreported, but is available at 2007 WL 403586.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2010. A petition for rehearing was denied on September 23, 2010 (Pet. App. 40). The petition for a writ of certiorari was filed on December 20, 2010. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted of conspiracy to possess with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. 846 and 841(b)(1)(B)(ii); and distribution of 500 grams or more of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B), and 18 U.S.C. 2. Pet. App. 29. Petitioner was sentenced to 300 months of imprisonment, to be followed by eight years of supervised release, and ordered to forfeit $5026. *Id.* at 3, 29-31. The court of appeals affirmed the conviction and sentence but reversed the forfeiture order. *Id.* at 1-26.

1. In 2003, a task force of federal and local law enforcement officers began investigating suspected drug trafficking activity at a barbershop in Bowling Green, Kentucky. Pet. App. 1-2. During that investigation, the officers learned that petitioner was a major drug dealer in the area and was the supplier for one of the barbers. Mem. Op. 1 (filed Feb. 1, 2007) (2/1/07 Mem. Op.). The officers set up surveillance cameras both inside and outside the shop to capture evidence of drug activity. *Id.* at 1-2; Gov't C.A. Br. 4-5.

2. On May 3, 2006, a grand jury in the Western District of Kentucky returned a multi-count indictment charging petitioner and seven others with various narcotics-related offenses. Pet. App. 2. On the morning of May 15, officers went to a residence on Mt. Lebanon Church Road to execute a federal arrest warrant against petitioner. *Id.* at 11. They observed a vehicle associated with petitioner in the driveway and saw two pieces of

mail bearing petitioner's name in plain view in the vehicle. *Ibid.*; 2/1/07 Mem. Op. 2. The officers knocked on the door and announced their presence. *Ibid.* They heard music coming from inside and saw someone peer through the front-window blinds. *Ibid.* Nobody answered the door, however. *Ibid.* After waiting for approximately 45 minutes, the officers left to execute another arrest warrant. *Ibid.*

Shortly thereafter, state police received a call from a neighbor stating that a black male had left the residence in a red pickup truck. Pet. App. 11-13. A state trooper stopped the red pickup, in which petitioner was a passenger. *Id.* at 12; 2/1/07 Mem. Op. 3, 5. In a search incident to arrest, the trooper found a live 12-gauge shotgun shell in petitioner's front pants pocket. *Ibid.*

A state judge issued a search warrant for the Mt. Lebanon Church Road residence. Pet. App. 12. The warrant authorized officers to seize "12-gauge shotgun shells, a 12-gauge shotgun, and documentation regarding the purchase of a 12-gauge shotgun." 2/1/07 Mem. Op. 3. During the search, officers seized $5026 in cash, five shotgun shells, a baggie of marijuana, a safe-deposit key, various documents, four rifle rounds of ammunition, four surveillance cameras, and a JVC television. Pet. App. 12.

3. The grand jury issued a superseding multi-defendant indictment charging petitioner with one count of conspiracy to manufacture crack cocaine and to possess with intent to distribute crack cocaine, powder cocaine, and marijuana, in violation of 21 U.S.C. 846; one count of manufacturing crack cocaine, in violation of 21 U.S.C. 841(a)(1); and one count of distributing powder cocaine on or about February 1, 2006, in violation of 21 U.S.C. 841(a)(1). Pet. App. 1-2; Superseding Indictment

1-2, 10-11 (filed July 12, 2006) (Indictment). The indictment also sought forfeiture of the $5026 that officers had seized in the search. *Ibid.*

Before trial, petitioner moved to suppress the search of his residence. 2/1/07 Mem. Op. 3. Following an evidentiary hearing, the district court granted the motion in part and denied it in part. *Id.* at 1. The court first determined that the warrant was valid because "the discovery of [petitioner's] illegal possession of ammunition minutes after leaving the residence * * * established probable cause to believe additional evidence of his possession of firearms or ammunition would be found in that residence." *Id.* at 6. The court rejected petitioner's challenges to the affidavit supporting the warrant, observing that the affiant detective "had been involved in a year-long investigation of [petitioner] for drug trafficking"; was "aware of [petitioner's] two prior [felony] drug-trafficking convictions"; and believed, based on both his training and conversations with other officers, that firearms are generally associated with drug trafficking. *Id.* at 5-6.

The district court declined to suppress the television, cameras, cash, and safe-deposit key. 2/1/07 Mem. Op. 7-8. Although these items were not expressly listed in the warrant, the court determined that they fell within the Fourth Amendment's plain-view exception. *Ibid.* The court reasoned that the officers had probable cause to believe that the television and cameras "constituted a security system that police officers most typically see associated with drug traffickers" and that the cash and safe-deposit key were associated with the cash receipts of drug trafficking. *Id.* at 7. The district court suppressed, however, documents recovered in the search that were unrelated to firearms, concluding that the

officers lacked probable cause to believe the documents were incriminating. *Id.* at 6-8.

4. a. At trial, the government presented 12 witnesses during its case-in-chief, six of whom testified about their knowledge of petitioner's drug dealing. Mem. Op. 4 (filed Feb. 6, 2008) (2/6/08 Mem. Op.). "Of particular note, the jury heard testimony from co-conspirator Jerome Shanklin concerning a half-kilogram powder cocaine deal on February 1, 2006." *Ibid.*; see Pet. App. 7 (observing that Shanklin "testified that he received cocaine directly from [petitioner] three times—one half kilo and then one kilo in January and another half kilo on February 1, 2006"). Shanklin testified that on that date, petitioner directed that the two of them meet to exchange cocaine that petitioner was fronting to Shanklin and that Shanklin call petitioner once Shanklin's buyer had paid for the cocaine. *Id.* at 18. The jury also "viewed videotapes and cellular telephone records that corroborated Shanklin's testimony concerning the deal." 2/6/08 Mem. Op. 4; see Pet. App. 7. Surveillance footage from February 1, 2006, showed Shanklin selling approximately half a kilogram of cocaine, receiving a "large wad of money that he placed in a Nike shoe box," and later placing that shoe box into a black sport utility vehicle that petitioner had driven to the barbershop parking lot. 2/1/07 Mem. Op. 1-2; see Pet. App. 18; Gov't C.A. Br. 4, 18.

b. One of the government's other witnesses was co-defendant William Downey. Pet. App. 2; 2/6/08 Mem. Op. 3-4. Downey, unlike several other witnesses (including Shanklin), had no direct drug deals with petitioner, but interacted with him only through a middleman. Pet. App. 6-7; 2/6/08 Mem. Op. 3. Downey testified about two occasions in January 2006 when he and the middleman

purchased 12 ounces of powder cocaine from petitioner. Pet. App. 6-7; 2/6/08 Mem. Op. 3-4.

During Downey's direct examination, the government elicited testimony about the terms of his plea agreement. As a result of the government's filing an information pursuant to 21 U.S.C. 851, Downey faced a mandatory-minimum sentence of 20 years of imprisonment. 6/7/07 Tr. 20-22, 25. In exchange for Downey's cooperation, the government had agreed not to file a second Section 851 information that would have increased Downey's sentence to a mandatory minimum of life. *Id.* at 25-26. Downey agreed that no "promises or guarantees [were] made to [him] about what kind of sentence [he was] looking at," *id.* at 22, and that nothing in the agreement "suggests or promises or puts down on paper any kind of promise to consider or actually file any kind of motion with the Court to get [Downey] anything less than a 20-year sentence," *id.* at 26.

During cross-examination, Downey testified that he did hope to "get a 5K1 reduction" for substantial assistance to the government under Sentencing Guidelines § 5K1.1 and thereby receive a sentence below the mandatory-minimum term of 20 years of imprisonment. 6/7/07 Tr. 51; see *id.* at 52 (Downey agreeing with defense counsel that "when the government's holding your life in your hands, and you're looking at a potential of getting a 5K1 reduction, you're going to roll like that, correct?"). On redirect, Downey admitted that he did not want to testify but was doing so to fulfill his cooperation agreement; that even if he told the truth, he was not "going to get a better deal than what's in [his] plea agreement"; that "the best [he could] hope for is what's in that plea agreement"; and that the agreement did

not include any mention of a motion "asking the judge * * * to lower [his] sentence." *Id.* at 56-57.

c. The jury convicted petitioner of conspiracy to distribute between 500 grams and five kilograms of powder cocaine (a lesser-included offense of the first charge against him), in violation of 21 U.S.C. 846 and 841(b)(1)(B)(ii); and distribution of 500 grams or more of cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B), and 18 U.S.C. 2. Pet. App. 3, 29. The jury acquitted petitioner on the count of manufacturing crack cocaine. *Id.* at 3. The district court also ordered the forfeiture of the $5026 seized during the search of petitioner's residence. *Ibid.*

5. About three months later, the trial prosecutor sent a letter to petitioner's counsel. Pet. App. 3; 06-00024 Docket entry No. 436 Attach. 4 (filed Dec. 20, 2007). She informed counsel that she had recently become aware, following Downey's sentencing hearing, that a prosecutor previously assigned to petitioner's case had informed Downey that Downey "would be considered for a sentence less than 20 years if he testified truthfully during any trial." Her "further investigation" of the matter had revealed, however, that "no specific promises or guarantees were made to Mr. Downey." *Ibid.*

Petitioner moved for a new trial, arguing that the government had violated the disclosure requirements of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and had engaged in prosecutorial misconduct. Pet. App. 3; 06-00024 Docket entry No. 436 (filed Dec. 20, 2007). The district court denied the motion on the papers. Pet. App. 3; 2/6/08 Mem. Op.

As to the *Brady* claim, the district court concluded that petitioner had "failed to show that the evidence that

Downey was promised some consideration for truthful trial testimony created a reasonable probability that the outcome of the proceedings would have been different." 2/6/08 Mem. Op. 5. The court observed that Downey had said on cross-examination "that he was testifying because he hoped to get a 5K1 reduction." *Id.* at 4. The court also observed, among other things, that the government had called 11 other witnesses; that Shanklin's testimony was "[o]f particular note"; and that the jury had found petitioner guilty of the count "covering the February 1, 2006 transaction" about which Shanklin had testified. *Ibid.*

As to the prosecutorial-misconduct claim, the district court reasoned that "although the prosecutor's statements [during examination of Downey] may have been incorrect they did not concern a central issue in the case"; that the questioning on this issue was not "extensive"; that there was "no evidence that the remarks were deliberately made"; that the "evidence before this Court confirms that the prosecutor learned of the agreement for the first time at Downey's sentencing hearing"; and that, for reasons the court had discussed in connection with the *Brady* claim, "there was strong evidence against [petitioner] irrespective of Downey's testimony." 2/6/08 Mem. Op. 5-6.

6. The court of appeals affirmed petitioner's conviction and sentence, but reversed the district court's forfeiture order. Pet. App. 1-26.

a. As relevant here, the court of appeals first concluded that the district court did not abuse its discretion in denying a new trial. Pet. App. 4-10. The court recognized that petitioner would be entitled to relief under *Brady* and related cases if the government failed to turn over impeachment evidence and the evidence was ma-

terial—*i.e.*, there was a reasonable probability of a different trial outcome if the evidence had been disclosed. *Id.* at 4-5 (citing, *inter alia*, *Giglio* v. *United States*, 405 U.S. 150, 154-155 (1972), and *Kyles* v. *Whitley*, 514 U.S. 419, 433 (1995)). The government conceded that the cooperation agreement was impeachment evidence, see, *e.g.*, Gov't C.A. Br. 15-16, so the court of appeals addressed only the question of materiality. The court of appeals agreed with the district court that there was no reasonable probability that the trial outcome would have changed had the evidence been disclosed, because "Downey's reliability was not 'determinative of guilt or innocence.'" Pet. App. 6 (quoting *Giglio*, 405 U.S. at 154). The court noted that Downey was only one of 12 witnesses and, unlike several other witnesses, had not dealt directly with petitioner. *Id.* at 6-7. The court reasoned that "the closest to being characterized as a 'key witness'" was not Downey, but Shanklin, who had testified to multiple cocaine transactions, including the February 1, 2006, transaction that had been corroborated by videotapes and cellphone records. *Id.* at 7. Observing that the jury had found petitioner guilty of that February 1 transaction "as well as the conspiracy charge for that time period," the court concluded that "Shanklin's testimony supports the jury's verdict here." *Ibid.*

The court of appeals also rejected, for two independent reasons, petitioner's contention that a new trial was required because the government had knowingly relied on perjured testimony. Pet. App. 8-9. First, the court concluded that petitioner could not satisfy even the "relaxed standard" of materiality that it would apply to the knowing use of false testimony, under which it would grant a new trial if there were "any reasonable likelihood that the false testimony could have affected the

judgment of the jury." *Ibid.* For reasons it had already explained, "Downey was not the key witness," and Shanklin's testimony, in connection with other evidence, "easily supports the jury's verdict." *Id.* at 8. Second, the court found no indication that the trial prosecutor "*knowingly* used perjured testimony," observing that it was she who disclosed the information to petitioner. *Id.* at 9.

b. In addition to affirming the denial of the new-trial motion, the court of appeals also found no reversible error in the admission at trial of evidence obtained during the search of petitioner's residence. Pet. App. 11-16. The court stated that the validity of the search warrant was "problematic," noting that possession of ammunition by a felon does not violate state law; that the affidavit supporting the warrant had inaccurately stated that a neighbor had seen petitioner leaving the residence, when in fact the neighbor had said only that a black male had done so; that the affiant detective had not himself surveilled the residence; and that there was no direct evidence that petitioner dealt drugs out of the residence or kept firearms there. *Id.* at 13-14. But the court perceived no need actually to decide whether the warrant was valid. *Id.* at 14. "Any error," it recognized, "is subject to harmless-error review." *Id.* at 13 (citing *United States* v. *Garcia*, 496 F.3d 495, 512 (6th Cir. 2007) (citing *Chapman* v. *California*, 386 U.S. 18, 22 (1967)). "Given the overwhelming evidence of [petitioner's] guilt on the cocaine charges," it continued, "any error was harmless here." *Id.* at 14.

The court of appeals also concluded that the seizure of certain items not mentioned in the warrant—the television, cameras, safe-deposit key, and camera—was not justified under the plain-view exception, because it

"cannot be said that the incriminating nature of these items was immediately apparent given that the officers were purportedly searching for evidence that [petitioner] illegally possessed a firearm." Pet. App. 15. "Again, though, the introduction of this evidence at trial was harmless." *Id.* at 16.

ARGUMENT

Petitioner renews (Pet. 11-31) his contentions that the district court abused its discretion in denying a new trial and committed reversible error by admitting fruits of the residence search into evidence. The court of appeals correctly rejected both contentions, and its decision does not conflict with any decision of this Court or of another court of appeals. Petitioner's fact-bound arguments regarding the application of settled law to the facts of his case do not warrant further review. Sup. Ct. R. 10.

1. Petitioner first contends (Pet. 19-25) that he is entitled to a new trial based on the government's failure to disclose the oral representations it had made to Downey before trial. That contention lacks merit.

The Due Process Clause forbids the prosecution from suppressing material evidence that is favorable to the defendant. *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). Due process also forbids the government from obtaining a conviction using a government witness's false testimony about promises made to him in exchange for his testimony. See, *e.g.*, *Giglio* v. *United States*, 405 U.S. 150, 153 (1972). As petitioner acknowledges (Pet. 20, 22-23), to prevail on a *Brady* or *Giglio* claim, a defendant must show, among other things, that any evidence withheld by the prosecution would have been material at trial. *United States* v. *Agurs*, 427 U.S. 97, 103-106

(1976). Both the district court and the court of appeals correctly determined that petitioner did not make that showing here. Pet. App. 7-9; 2/6/08 Mem. Op. 5-6.

To the extent that petitioner suggests (Pet. 16-23) that the court of appeals applied the wrong materiality standard, that suggestion lacks merit. The court expressly assessed, and rejected, petitioner's arguments under both of the prejudice standards petitioner now advances. Petitioner states that, for purposes of a *Brady* claim alleging suppression of evidence, such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Pet. 20 (citing *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)). The court of appeals applied that exact standard and concluded that petitioner could not meet it. Pet. App. 4-5 (new trial warranted under *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different") (quoting *Kyles* v. *Whitley*, 514 U.S. 419, 433-434 (1995) (quoting *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.)). Petitioner also states that, for purposes of a *Giglio* claim alleging knowing presentation of false testimony, such testimony is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Pet. 22-23 (citation omitted). The court of appeals applied that exact standard as well and concluded that petitioner could not meet it, either. Pet. App. 8 (new trial warranted when prosecution knowingly uses perjured testimony "if there is any rea-

sonable likelihood that the false testimony could have affected the judgment of the jury"); see *id.* at 9.[1]

To the extent that petitioner's argument simply reflects disagreement with how the courts below weighed the evidence (Pet. 21-24), that fact-bound argument does not meet the standards for this Court's review. See Sup. Ct. R. 10. The argument lacks merit in any event, as the court correctly concluded that petitioner could not meet even what it characterized as the more "relaxed standard" of showing a "reasonable likelihood" that the jury's judgment was affected. Pet. App. 8. Petitioner was convicted on counts of cocaine distribution "[o]n and about February 1, 2006" and conspiracy to distribute cocaine for a period including that date. Indictment 1-2, 10-11; Pet. App. 29. As the district court and the court of appeals both recognized, Shanklin's testimony about a half-kilogram drug transaction on that date, in combination with videotape and cellphone-record corroboration, established petitioner's guilt on both counts. Pet. App. 7; 2/6/08 Mem. Op. 4.

Petitioner speculates (*e.g.*, Pet. 21-22) that the jury must have relied on Downey's testimony rather than Shanklin's, asserting that the jury disbelieved Shanklin's testimony about certain acquitted conduct. That argument overlooks the close correspondence between Shanklin's testimony and the charged conduct; the

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[1] Petitioner briefly asserts (Pet. 16) that the decision creates an intra-circuit conflict with *Bell* v. *Bell*, 460 F.3d 739 (6th Cir. 2006). The *Bell* opinion, however, was vacated on rehearing en banc, see *Bell* v. *Bell*, 512 F.3d 223 (6th Cir.) (en banc), cert. denied, 129 S. Ct. 114 (2008), and the court of appeals in this case cited the en banc opinion in its discussion of the proper legal standard. See Pet. App. 5. In any event, an intra-circuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

lesser relevance of Downey's testimony about January 2006 transactions that did not directly involve petitioner; the independent evidentiary force of the surveillance tapes; and the conclusions of both lower courts (including the district court, which heard all of the trial evidence directly). See Pet. App. 6-7; 2/6/08 Mem. Op. 4; see *Agurs*, 427 U.S. at 112-113 ("If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial."). Petitioner's argument also wrongly assumes that the jury, which had already heard evidence that Downey had a sentencing-related incentive to cooperate, see pp. 6-7, *supra*, would have viewed Downey in a substantially different light had it been aware of an additional such incentive. *See United States* v. *Morris*, 498 F.3d 634, 640 (7th Cir. 2007) ("Although the jury might have recognized the potential for an additional reduction in [the witness's] sentence as a marginally greater incentive for [the witness] to tailor his testimony in favor of the government, the information that the jury had before it was not different enough to lead us to believe that there was a 'reasonable likelihood' that the result would have changed."). No further review is warranted.[2]

2. Petitioner also contends (Pet. 27-29) that the court of appeals' application of the harmless error standard to the admission of evidence seized from his resi-

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[2] Petitioner's list of questions presented also includes "[w]hether an agreement between the prosecution and a witness is required under *Brady* before the prosecution must disclose evidence of potential or actual lenient treatment." Pet. i. The body of the petition mentions this issue only as "an interesting question" raised in the vacated panel opinion in *Bell* v *Bell*. Pet. 16; see note 1, *supra*. Petitioner does not explain how the question is presented in this case.

dence conflicts with *Chapman* v. *California*, 386 U.S. 18 (1967). That contention is likewise without merit.

The court of appeals' decision makes clear that it was applying the *Chapman* standard. In reciting the principles governing review of a district court's denial of a suppression motion, the court recognized that "[a]ny error is subject to harmless-error review." Pet. App. 13. In support of that proposition, it cited *United States* v. *Garcia*, 496 F.3d 495, 512 (6th Cir. 2007), and observed that *Garcia*, in turn, relies on *Chapman*. Pet. App. 13; see *Garcia*, 496 F.3d at 506 ("Before a federal constitutional error can be held harmless, the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt.") (quoting *Chapman*, 386 U.S. at 24) (brackets omitted). The court of appeals concluded that "any error was harmless here" in light of the "overwhelming evidence of [petitioner's] guilt on the cocaine charges." Pet. App. 14; see *id.* at 16 (similar conclusion for seizure of items not listed in warrant). Petitioner's fact-bound disagreement with the court of appeals' evaluation of the evidence lacks merit for reasons previously discussed, see p. 13, *supra*, and would not warrant this Court's review in any event.[3]

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[3] Review is particularly inappropriate because the court of appeals declined to address the validity of the warrant, Pet. App. 14, and the government would maintain that the admission of the seized evidence at trial did not violate the Fourth Amendment in the first place.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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